RECENT CASES.

ATTORNEYS—DISBARMENT—UNPROFESSIONAL CONDUCT.—For an attorney to publish and circulate pamphlets and other advertisements containing information as to the divorce laws of his State, for the purpose of advertising, so as to attract persons to the State to apply for divorce through his agency, for his profit, is such misconduct as to warrant his suspension or disbarment, under Comp. Laws, Section 2625. *In re* Schmitzer, 112 Pac. Rep. 848 (Nev., 1911).

One of the advertisements contained the following statement: "*Divorce Laws of Nevada.* Have you domestic troubles? Are you seeking *Divorce?* Do you want quick and reliable action? Send for my booklet. Contains complete information. *Free.* Shortest residence. Address Counsellor, P. O. Box 263, Reno, Nevada. Correspondence strictly confidential." In a *per curiam* opinion the court say that as this was the first case of such a nature brought before them, and the respondent discontinued the advertising when informed by the bar association of his city that such methods were condemned by it, they are inclined to leniency. They, therefore, only suspended him for six months. A case quite similar to the present one arose in Colorado. The attorney had advertised in a newspaper of large circulation that divorces might be "legally obtained very quietly; good everywhere. Box 2344, Denver." People v. McCabe, 18 Col. 186, 32 Pac. Rep. 280, 19 L. R. A. 231. The opinion rendered by the Colorado court is quoted from at length in the principal case. It was there said: "The ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares"; and further, that divorce was a very serious matter to society as well as the individuals concerned, and "for any one to invite or encourage such litigation is most reprehensible." In both cases it was the first time such a matter had been brought to the attention of the court, and the attorney was only suspended; but in a later case in Colorado, where the facts were substantially similar, the attorney was disbarred. People v. Taylor, 32 Col. 250. Similarly, where the respondent inserted the following advertisement in a newspaper: "Loyal, wealthy attorney guarantees family freedom in month; no advance costs; witnesses quietly volunteered. K. 333, Tribune Office," in violation of the statutes (Hurd's Revised Statutes, p. 68), it was held a ground for disbarment. People v. Smith, 200 Ill. 442, 66 N. E. Rep. 27, 93 Am. St. Rep. 206. The case of People v. Goodrich, 79 Ill. 148, was decided the same way.

As to the distinction between soliciting business and advertising, see case note to Ingersoll, *et al.*, v. Coal Creek Coal Co., *et al.*, 9 L. R. A. 282 (Tenn.).

BILLS AND NOTES—LIABILITY OF ANOMALOUS INDORSER TO PAYEE UNDER NEGOTIABLE INSTRUMENTS LAW.—Under Section 64 (1) of the Negotiable Instruments Law, a person not otherwise a party, who places his signature in blank, before delivery, on a promissory note payable to the order of a third party, becomes liable as indorser to the payee and all subsequent parties. So in Aldred's Estate, 229 Pa. 627 (1911), an anomalous indorser, for the accommodation of the maker, was held liable to the payee. Prior to the act the indorsement of such person would have been irregular and he would not have been liable to the payee in Pennsylvania. Schafer v. Bank, 59 Pa. 144 (1868); Temple v. Baker, 129 Pa. 634 (1889).

Before the act jurisdictions differed as to the liability of one who indorsed a promissory note before the payee. See cases cited in Byles on Bills, 5th American edition, 144. By force of this section and Section 63, the law

has been changed in States which have adopted the Negotiable Instruments Law, and in which a person signing in blank before delivery for the accommodation of the maker was formerly held to be a joint maker or guarantor. Now he is an indorser and is chargeable only after notice of dishonor. Gibbs v. Guaraglia, 75 N. J. L. 168 (1907); Rockfield v. Bank, 77 Oh. St. 318 (1907); Deahy v. Choquet, 28 R. I. 338 (1907). And in Thorpe v. White, 188 Mass. 333 (1905), such a person was held, by virtue of the act, to be an indorser and liable as such, where the maker had altered the note without the indorser's knowledge. This sub-section, however, has no application to a case where the signature was placed on the instrument after its delivery to the payee, Kohn v. Consolidated Co., 30 Misc. R. 725 (N. Y., 1900); unless it is part of the agreement between the parties that the note shall be so indorsed to be acceptable, Downey v. O'Keefe, 26 R. I. 571 (1905). And in an action by the payee against the indorser under this section an allegation and evidence of the intention of the indorser to be liable to the payee is unnecessary and immaterial, Bank v. Norton, 186 N. Y. 484 (1906). Parol evidence of a contrary intention is not admissible, Baumeister v. Kuntz, 53 Fla. 340 (1907). *Contra,* Bank v. Busby, 120 Tenn. 652 (1908).

This section has been interpreted in a few other jurisdictions, always in accord with the principal case. Peck v. Easton, 74 Conn. 456 (1902); Co. v. Taylor, 148 N. C. 362 (1908); Farquhar v. Higham, 16 N. D. 106 (1907). Section 64 is not in the Bills of Exchange Act, but Sections 56 of the English and Canadian Acts are similar to Section 63, Negotiable Instruments Law; and under this section one who indorses a note may be liable as an indorser to the payee although it had not been first indorsed by the payee, McDonough v. Cook, 19 Ontario L. R. 267 (1909), following dictum in Robinson v. Mann, 31 Can. S. C. 484 (1901), where it was said: "By force of the statute the indorsement operated as what has long been known in the French Commercial Law as an 'aval,' a form of liability which is now by statute adopted in English law."

BILLS AND NOTES—VALUE UNDER NEGOTIABLE INSTRUMENTS LAW—COLLATERAL SECURITY FOR AN ANTECEDENT DEBT.—In National Bank of Commerce in St. Louis v. Morris, 135 S. W. 1008 Mo., 1911, before maturity the plaintiff received as collateral security for an antecedent debt from a third party, the promissory note of the defendant. It was held that under Section 25 of the Negotiable Instruments Law, which provides that "an antecedent or pre-existing debt constitutes value," that the plaintiff was a holder for value. Recovery was allowed.

Due to a dictum by Story, J., in Swift v. Tyson, 16 Pet. 1 (1842), adopted by the court as law in Brooklyn City, etc., Co. v. National Bank, 102 U. S. 14 (1880), the rule was very generally established before the Negotiable Instruments Law that one who took commercial paper as collateral security for an antecedent debt was a holder for value. Roberts v. Hall, 37 Conn. 205 (1870); Foy v. Blackstone, 31 Ill. 538 (1863), and cases cited in note 1, Ames's Cases on Bills and Notes, 650.

New York and Pennsylvania, however, consistently refused to recognize this doctrine, Bay v. Coddington, 5 Johns. 54 (1820); Maynard v. National Bank, 98 Pa. 250 (1881), save in the case of accommodation paper. Grocers Bank v. Penfield, 7 Hun, 279 (1876); Lord v. Ocean Bank, 20 Pa. 384 (1853).

As illustrated in the leading case, the Negotiable Instruments Law is held to have changed the law of Missouri, which was formerly in accord with New York and Pennsylvania. Loewer v. Forsee, 137 Mo. 29 (1896). It is not certain, however, that the act has had this effect in New York and Pennsylvania. Brewster v. Schrader, 57 N. Y. Supp. 606 (1899), would seem to indicate that the law has been changed, but the court in Bank of America v. Waydell, 187 N. Y. 115 (1907), evades the issue and even refers to Bay v. Coddington, *supra,* with approval. It is impossible to tell the exact state of the New York law in this connection. In Pennsylvania, no decision has yet been made by the Supreme Court, but a lower court case, Raken v. Henry, 16 Dist. Rep. 208 (1907), re-affirms the old Pennsylvania doctrine.

The rule of Swift v. Tyson, however, seems now well established in other jurisdictions. See in addition to the cases cited in the opinion: Wilkins v. Usher, 123 Ky. 696 (1906); Graham v. Smith, 155 Mich. 65 (1908); Brannan: Negotiable Instruments Law, 2nd Ed., 34.

CONSTITUTIONAL LAW—TAX UPON MONEY DEPOSITED IN NATIONAL BANKS.—State v. Clement National Bank, 78 Atl. 941 (Vt., 1911), involves the right of a State to tax depositors in a national bank on all interest bearing deposits. The tax was upon the individual depositors, not against the bank, but the defendant bank had availed itself of the option of paying the tax for the depositors, with the right to charge the sum paid against such depositors. The tax was objected to, *inter alia*, as being in effect a tax on the property or business of the bank; but the court overruled that and all other objections and sustained the tax.

Since McCullough v. Maryland, 4 Wheat. 316 (1819), it has never been doubted that national banks are instrumentalities of the federal government, and as such cannot be taxed by the States without consent of Congress. The only taxation permitted is upon the real estate of the bank, and its shares of stock as the property of its stockholders; and this does not authorize a taxation of the bank's franchise in lieu of the taxation of shares, Bank v. Owensboro, 173 U. S. 664 (1899); nor of its personal property, even where the shares have not been taxed, Bank v. San Francisco, 129 Cal. 96 (1900). But agencies of the federal government are exempt from State legislation only so far as that legislation impairs their efficiency in performing the functions of their agency, Railroad Co. v. Paniston, 18 Wall. 5 (1873). It is true that deposits become a part of the working capital of a bank, and that any taxation of the depositors may have a tendency to lessen this resource, but it cannot be seriously contended that the efficiency of national banks as instrumentalities of the government will be endangered by any taxation of depositors which is free from unjust discrimination.

In the case of an ordinary loan the property transferred to the borrower and the debt accruing to the lender are considered distinct and separate interests, and the State can impose a tax upon each, People v. Worthington, 21 Ill. 171 (1859). Since the relation between the bank and an ordinary depositor is that of debtor and creditor, Bank v. Massey, 192 U. S. 138 (1904), it would seem that a borrowing bank can be protected from taxation by the doctrine of federal supremacy without impairing the right of the State to tax the bank's creditor—the depositor. Nor is the objection well founded, that the publicity required to be given to the business of the depositor and the bank by the prescribed return, is an unlawful interference with the business of national banks, Waite v. Dowley, 94 U. S. 527 (1876). The decision in the principal case, therefore, seems sound; especially as a contrary ruling would allow all uninvested capital to escape taxation by seeking a refuge in national banks. See Brightley's Note to McCullough v. Maryland, 4 Wheat., 4th edition 159.

CONTEMPT—FALSE STATEMENT OF ATTORNEY TO INTRODUCE EVIDENCE.—The case of Goodhart v. State 78 Atl. 853 (Conn., 1911), presents upon its facts a new example of what may be contempt of court by an attorney. Certain questions were asked of a witness for the defence, and on objection of the district attorney, the court told the present appellant, who was counsel for the defence, that they would overrule the objction if this evidence was being introduced to show insanity of the accused. Appellant replied that he was going to prove by this evidence that accused was mentally incapable of committing the crime. Appellant proceeded to prove matter entirely collateral to the defendant's mental condition and was adjudged in contempt. In reviewing and affirming the case the Supreme Court cited no analogous cases, confining the discussion to the facts and their right to review them.

In spite of the fact that no cases on the exact point appear to have arisen, this case appears to be well within the law of contempt. Contempt has been

defined in part as the disobedience or resistance of a lawful order of a court or judge. Rapalze: Contempt, Section 16. The reason for the power of the court to commit or fine for contempt is obvious and has always been recognized by courts of law. As early as 1400 A. D. no less a person than the heir apparent (afterwards Henry V), was thrown into prison by Gascoigne, C. J., for contempt of court. Oswald on Contempt, p. 22. Nor does the law respect a person's rank in modern times. Case of Duchess of Sutherland, "Times," 19th March, 1893. Attorneys are also fully subject to the penalties for contempt. So attorneys have been held for contempt for bringing a fictitious suit, Smith v. Brown, 3 Tex. 360 (1848); prompting witnesses in their answers, U. S. v. Anon., 21 Fed. 761 (1889); appearing in court armed with a deadly weapon, Sharon v. Hill, 7 Ky. Law Rep. 171 (1885); presenting straw bail, *In re Ingersoll*, 9 Phila. (Pa) 216 (1874); refusing to deliver up deeds upon order of the court, *Ex parte* Willard, 20 Eng. Law & Eq. 293. It does not seem to matter whether the matter be spoken in court or written to the judge after the decision. *In re* Pryor, 18 Kan. 72 (1877).

The only cases involving a point at all similar to the one under discussion are Beattie v. People, 33 Ill. App. 651 (1889), and Linwood v. Moore, 58 L. T. 612 (1888). In the first case an attorney was convicted of contempt for knowingly procuring false evidence of adultery in a divorce suit. In Linwood v. Moore, *supra*, the attorney connived at the presenting of false affidavits and was duly fined and imprisoned after a scathing opinion by the court. While the offense committed in each of these cases was more serious than in Goodhart v. State, *supra*, it is difficult to see just how they differ in principle. If contempt is the "opposing or despising the authority, justice or dignity of the court," Practical Registfer in Chancery, p. 133, surely an offence of this nature, which is done with premeditation and strikes at the very function of a court—the administration of justice—is far more a contempt than the mere creating, by word or act, of a disturbance in court, which is often the result of passion and excitement and merely offends the dignity of the justice's position. Yet it can scarcely be doubted that had the attorney in Goodhart v. State called the judge by an opproprious epithet, he would never have even considered taking an appeal, so well settled is the law on this point. It is submitted that any deceptive conduct on the part of attorneys is far more in the real nature of contempt than mere misbehavior in court, and hence that the decision of Goodhart v. State is sound law.

CONTRACTS—DIVISIBLE—SALE—REALTY.—Where under a contract for the sale of realty, an instalment of the purchase money was to be paid at a certain date, and the date for the closing of the deal was not to be delayed beyond a certain time subsequent to that named for the payment of the first instalment, the contract was divisible and the vendor was entitled to recover the first instalment of the price prior to the date named for the conveyance without tendering or offering to tender a deed. Straus, *et al.*, v. Geager, 93 N. E. 877 (Ind., 1911).

Covenants are divided by Lord Mansfield, and the same remark applies to contracts, into three classes. The first class consists of such as are mutual and independent where separate actions lie for breaches on either side. Jones v. Barkley, Douglas, 665 (1781). The question whether the covenants are dependent or independent must be determined by the construction to be placed on the language employed by the parties to express their intention. The intention governs and it is to be sought rather in the order of time in which the acts are to be done, than in the structure of the instrument. Goldsborough v. Orr, 8 Wheat. 217 (1823); Goodwin v. Lynn, 4 Wash. C. C. 714 (1827). "In many cases the rule of construction is adopted, that an agreement to pay by instalments or at different times would make the covenants independent, since such an agreement manifests an unwillingness to rely on the covenants of the other contracting party for title or performance as the consideration for such payments." Loud v. Pomona Land Co., 153 U. S. 564 (1893).

So it has been universally held that where under a contract for the sale of land, the time for payment may happen before the time appointed for the conveyance to be made, the contract is divisible, the covenants are independent, and an action for the purchase money may be maintained without a tender of conveyance. Raine v. Brown, 37 N. Y. 228 (1867); Wile v. Rochester Imp. Co., 24 Ind. App. 425 (1899); Shemmers v. Pritchard, 104 Wis. 287 (1899); Bower v. Bailey, 42 Miss. 405 (1869); Biddle v. Coryell, 18 N. J. L. 377 (1842); Devling v. Little, 26 Pa. 502 (1856); Wooten v. Walters, 110 N. C. 251 (1892); Keeler v. Clifford, 165 Ill. 544 (1897). *A fortiori*, when the payment of price and conveyance are to be concurrent acts, the rule is *contra*. Ewing v. Wightman, 167 N. Y. 107 (1901).

CRIMES—EVIDENCE OF PRIOR CRIMINAL CONDUCT AS PROOF OF PRESENT ACT—INCEST.—In the first appeal to the House of Lords under the Criminal Appeal Act of 1907, the defendants, who were brother and sister, were indicted under the Punishment of Incest Act of 1908, for intercourse during stated periods in 1910. The question was as to the admissibility of evidence of previous acts of intercourse during 1907. *Held:* The evidence was admissible, on the issue that the crime was committed, to establish the guilty relation and the existence of a sexual passion as elements in proving the act charged on or between the dates named. Rex v. Ball, L. R. (1911), A. C. 47.

As a general rule, evidence that the prisoner has committed other acts of the same character are not admissible to raise a presumption that he committed the act in question. Schaeffer v. Com., 72 Pa. 65 (1872); Miller v. Curtis, 158 Mass. 127 (1893); People v. McLaughlin, 150 N. Y. 365 (1896).

There is, however, a class of case in which much evidence is admitted seemingly in contradiction of the general rule. Where there is shown an opportunity to commit a certain crime and the question is whether the defendant took advantage of it, his mental attitude towards it become highly relevant. In such situations evidence of acts done under like opportunities similar to the act in question is admissible.

But the admission of this evidence seems limited to cases of adultery, fornication, incest and abortion, where it is both necessary and highly probative. Adultery can seldom be proved by direct evidence; so where an adulterous disposition is found as to both parties, mere opportunity with comparatively slight circumstances showing guilt will justify the inference of the commission of the act. There seems to be no distinction between adultery and incest, and it has been almost universally held in England and the United States that in such cases prior acts of intercourse between the parties are admissible, even though a prosecution therefor has been barred by the Statute of Limitations.

Duke of Norfold v. Germaine, 12 How. St. Tr. 943 (1692); Boddy v. Boddy, 30 L. J. P. M. A. 23 (1861); Wales v. Wales, Prob. 63 (1900); People v. Patterson, 102 Cal. 239 (1894); Taylor v. State, 110 Ga. 150 (1900); People v. Skutt, 96 Mich. 449 (1893); Com. v. Bell, 166 Pa. 405 (1895); State v. Bridgeman, 49 Vt. 202 (1876); Skidmore v. State, 26 L. R. A. N. S. 466, and note.

DAMAGES—TORTS—COMPENSATION FOR DELAY IN PAYMENT INCLUDED IN VERDICT.—In actions for compensation for taking by eminent domain, the jury may award as damages for delay in payment, if the delay was not caused, or found by the jury to be caused, by the fault of the plaintiff. And such damages are properly measured by the legal rate of interest. Rea v. Pittsburgh, &c., R. R. Co., 78 Atl. (Pa., 1910) 73.

This decision is substantially a re-affirmance of the doctrine of the earlier cases in Pennsylvania. Such additional sum may be included in the verdict by the jury, not as interest, but as additional damages by way of compensation for the delay in paying the damage in chief. Provident Life & Trust Co. v. Philadelphia, 202 Pa. 78 (1902). It rests upon the general

principle that the loss in market value arises at the exact time of the taking. The owner is entitled to compensation therefor, but the difference in market value will not be compensation unless received as of the date of the taking. Richards v. Citizens Natural Gas Co., 130 Pa. 37 (1889). However, it is not proper for the court to charge the jury that they must allow such damages, Rothwell v. California Borough, 21 Pa. Super. 234 (1902); nor to denote it interest, as such, but it must be as compensation for delay in payment; Hewitt v. R. R., 19 Pa. Super. 304 (1902). But if directed as a matter of law to allow such compensation, the amount thereof may be the subject of a *remittitur* on appeal, the plaintiff being willing, and the judgment as reduced affirmed. Rothwell v. California Borough, *supra*. However, if the objection to the form of charge is not taken at the trial, and the charge otherwise clearly distinguishes between interest, as such, and compensation for delay, the use of words "should allow" is not cause for reversal nor for reduction. Provident Life & Trust Co. v. Philadelphia, *supra*. Recent cases have imposed a further limitation on the principle. The jury should be instructed that the added sum for such compensation is "not to exceed legal interest and that it might be as much less as they saw fit to make it." Per Morrison, J., in Sheralier v. Postal Teleg. Co., 22 Pa. Super. 506 (1903), and Reecer v. Rodgers, 40 Pa. Super. 171 (1909). The charge must, it seems, expressly give the jury a scope between nothing and the legal rate of interest.

The exception to the rule is as well defined. Where the grossly excessive demands of the owner prevented prompt payment, and made reasonable and prudent the resort of the corporation to litigation, the jury should not be allowed to give compensation for delay. Stevenson v. Ebervale Coal Co., 203 Pa. 316 (1902). This was an action for pollution of water, and the court characterized the plaintiff's original demand as extortionate. *Accord*, Philadelphia Ball Club v. Philadelphia, 192 Pa. 632 (1899), an instance of a change of grade. In the principal case, it was held proper to instruct the jury to ascertain the damages, and to compare therewith the owner's demand, and to determine whether it was or was not extortionate. If thought not extortionate, but a mere honest difference of opinion, compensation for delay may be given. James v. West Chester, 220 Pa. 490 (1908).

The same principles extend to actions *ex delicto*, where the compensation can be measured by market value or other more or less definite standards. In Richards v. Gas Co., *supra*, where such compensation was said to be allowable, the loss was the destruction of the plaintiff's house and contents by an explosion of natural gas due to negligence. A similar case was McNeil Bros. v. Crucible Steel Co., 207 Pa. 493 (1904), the unintentional destruction of machinery and plant by a boiler explosion in the defendant's adjoining building, where the jury specified in their verdict that a certain amount was interest *eo nomine*. The principle was applied in Commonwealth v. Press Company, 156 Pa. 523 (1893), in an action amended to be *ex delicto*, for the recovery of overcharges on public advertising. The rate of legal interest affords the fair legal measure of the compensation for delay. Richards v. Nat. Gas. Co., *supra*.

DEEDS—DELIVERY—TO THIRD PERSON TO TAKE EFFECT ON DEATH OF GRANTOR.—In the case of Phillips v. Henry, 135 S. W. 382 (Tex., 1911), a certain deed of conveyance of real estate was delivered to a third person to be delivered to the grantee on the death of the grantor. The deed, duly executed, was delivered by the grantor, Patillo, to a cashier of a bank. It was in a sealed envelope addressed to the defendants, the grantees. Patillo told the cashier the deed was to be delivered after his death. Prior to his death, on several occasions he tried to sell the land in question, but all negotiations failed. It was held that the deed could operate neither as a conveyance nor a will.

It must be admitted that the decision is well within the law. While great differences will be found in the cases on the subject, this is due, not to any conflict in the rules of law, but to their application by the courts to

the facts of the cases. The cases fall into two classes. In the first the grantor, though he delivers to some third person to hold until a certain contingency happens, yet he parts absolutely with all claim or control over the property so deeded. In such case delivery to the grantee by the person so holding is valid and the conveyance is good. Prutsman v. Baker, 30 Wis. 644 (1872). There may be a question as to just when the deed takes effect; whether at the delivery by the depositary to the grantee, or whether it relates back to the first delivery. The latter seems the sounder rule; Warvelle, Vendors, Section 501, Vol. I. See also discussion in Putsman v. Baker, *supra*.

The other class of case is where the grantor delivers to a third person to take effect on a contingency, but retains some control or power of disposal over the property therein purported to be conveyed. The cases are uniform in holding such a deed inoperative, whether the grantor retains it in his own possession, Cline v. Jones, 111 Ill. 563 (1884); or if he delivers it to a third person to hold, Porter v. Woodhouse, 59 Conn. 568 (1890); Noble v. Tilton, 219 Ill. 182 (1905). The reason for this is obvious. It is said, Porter v. Woodhouse, *supra*: "The delivery of a deed includes not only an act by which the grantor parts with the possession of it, but also a concurring intent that it shall vest title in the grantee." In this case, having given directions as to the delivery of the deed in case of death, the grantor added: "If I live I will talk further about it." This was sufficient evidence of an intent not to part with absolute control. The cases are technical and perhaps hard in many instances, but the rule is strict and the above, far from being exceptional, is a typical case.

If the contingency is the death of the grantor, there seems no reason why, in this class of case the ineffectual deed should not be construed as a will, provided the testamentary law of the jurisdiction has been complied with. Wellborn v. Weaver, 17 Ga. 267 (1855); *contra*, Hayden v. Collins, 81 Pac. 1121 (Cal., 1905), no authorities cited. In our principal case the deed was not properly executed to take effect as a will. While the instrument cannot take effect as a deed because the grantor has not parted with all control, this, it will be seen, does not invalidate it as a will. Not only does a will not take effect until the testator's death, but it is ambulatory until then and he may revoke or alter it. See Warvelle, Vendors, Section 502, Vol. I.

EVIDENCE—NEIGHBORHOOD REPUTATION AS AN EXCEPTION TO THE HEARSAY RULE.—In a case concerning the descent of land, it was necessary to establish whether a child, whose birth occurred twenty years prior to the bringing of the suit, was born dead or alive. The testimony of a neighbor that it was generally understood throughout the thinly settled community in which the parties lived that the child had been born dead was admitted to corroborate the testimony of the mother and her daughter. Wiess v. Hall, 135 S. W. 384 (Tex., 1911). The court's reasoning in admitting this testimony was that a birth, death or marriage in a rural community is a subject of such interest and discussion among the neighbors, that an undisputed reputation would, in all probability, represent the truth.

In England and in many of our States the admission of such hearsay evidence has been confined to the reputation in the family concerned. This is on the principle that however interesting the facts may be to the neighbors, they are of real interest and concern only to the persons whose rights and relations are affected by them. The members of the family are the only persons who have sufficient interest to determine whether the report be true. Other courts have a tendency to admit neighborhood reputation in this class of cases dealing with family matters whenever the meagreness of other evidence, or the difficulty of obtaining it, renders it desirable to accept what is offered. Wigmore, Ev., Section 1605. In Ringhouse v. Keever, 49 Ill. 471 (1869), the court said: "In a population as unstable as ours, and comprising so many persons whose kindred are in distant lands, the refusal of all evidence in regard to death unless the reputation came from family relatives, would sometimes render the proof of death impossible, though there might exist no doubt of the fact, and thus defeat the ends of justice."

The admission of neighborhood reputation as to family matters has been strictly limited. It has almost universally been refused admission to establish legitimacy or otherwise. Flora v. Anderson, 25 Fed. 217 (1896); Estate of Heaton, 135 Cal. 385 (1902); *contra:* State v. McDonald, 106 Pac. 444 (Or., 1910). It has not been admitted to prove the relationship of various persons, Elder v. State, 123 Ala. 35 (1899); but to prove race, ancestry or color, common neighborhood report has been admitted in all cases, Gilliland v. Board of Education, 141 N. C. 482 (1906); Locklayer v. Locklayer, 35 So. 1008 (1904); Nave v. Williams, 22 Ind. 368 (1864). Neighborhood reputation has been held evidence of death and its time and place, Arents v. Long Island R. R., 156 N. Y. 1 (1898); Welch v. N. Y., etc., R. R., 182 Mass. 89 (1902) (only when brought home to family of the deceased); Ringhouse v. Keever, *supra*. Such evidence of death was excluded in Blaisdell v. Bickum, 139 Mass. 250 (1885), and Hurlburt's Estate, 68 Vt. 366 (1896). In admitting twenty-year-old common neighborhood gossip to prove the fact of a stillbirth, the principal case goes to an extreme which is not supported by the authorities.

MUNICIPAL CORPORATIONS—THE USE OF PATENTED MATERIALS IN MUNICIPAL CONTRACTS.—An Indiana statute provides that all contracts for municipal work shall be let to the lowest bidder. The Board of Public Works of Indianapolis agreed to use a patented process in paving the city streets, and contracted to pay a stated royalty to the patentee for the privilege of using the same. The specifications on which the contractors were asked to prepare bids, called for the patented paving and specified that the patentee's rights would be granted to any contractor who should do the work, at the specified royalty. It was held that the use of the patent rights was not an interference with the competition contemplated by the statute. Tousey v. City of Indianapolis, 94 N. E. Rep. 224 (Ind., 1911).

It is a well-settled general rule that all contracts in which the public are interested which tend to prevent competition, whenever a statute or known rule of law requires competition, are void. Foss v. Cummings, 149 Ill. 353 (1894); 1 Addison on Contracts, 273. Relying on this principle, it was held in Fishburn v. The City of Chicago, 171 Ill. 338, 39 L. R. A. 482 (1898), that under a statute similar to the Indiana statute mentioned, an ordinance for paving a certain street was void which required the use of asphaltum which could only be obtained by purchase from a single corporation, as such requirement restricted competition in bidding for the work. Similarly, it has been decided that where a city council contracts for paving a street with vitrified brick and the petition, ordinance and contract provide for brick of a particular brand, sold only by one company, and other kinds of vitrified brick, equally good, are sold in the vicinity by other companies, the proceedings and the contract are void. National Surety Co. v. Kansas City Hydraulic Press Brick Co., 73 Kan. 196 (1906).

It may be noted that in these cases the materials specified were not protected by letters patent. That being so, there is much to be said for the decisions in the cases cited, since the specification of the materials furnished by one manufacturer, where there were a number in the field, certainly curtailed competition in the matter of furnishing supplies for the work. But where a patented article is to be used, it would seem that a different proposition is presented. There can, at least, be no public policy which discourages the use of patented articles, since the very purpose of letters patent is to grant a monopoly of manufacture and sale for a definite period. John D. Park & Sons. Co. v. Hartman, 153 Fed., at 29 (1907). Hence the public policy which, aside from statute, condemns the contracts in the cases cited, *supra*, as being in restraint of trade, does not figure in the principal case. The only remaining question is: "Are contracts for the use of patented articles contrary to the statutory provision requiring the contract to go to the lowest bidder?"

In answer to this question the courts are divided. In Fineran v. Central Bitulithic Paving Co., 116 Ky. 495 (1903), the court flatly decided that an ordinance requiring the street to be improved with a patented bituminous macadam without placing it in competition with other like or equally as good material for such purposes, is void. But in Hobart v. The City of Detroit, 17 Mich. 246 (1868), Cooley J., reached the conclusion that the statute involved could not mean that a city should be utterly unable to adopt a patented process, however much it exceeded all others in utility, and even though the proprietors of the patent might be willing to lay it on terms more advantageous to the city than those on which pavement of less value could be procured.

In the light of the recent decision in our principal case, the courts of Indiana adopt a middle ground. In Monaghan v. City of Indianapolis, 37 Ind. App. 280 (1905), it was held that where the patentee of a pavement granted to all the right, at a certain price, to use his pavement, reserving to himself the right to decide whether the user was capable and competent to do the work, there can be no competitive bidding for the construction of a street, since the patentee virtually reserves the right to choose the bidder. But in Tonsey v. Indianapolis, *supra*, the court allowed the use of the patented article where the patentee did not reserve any rights to himself other than to collect the royalty from any one who should successfully bid for the work. It was held that since the royalty was uniform for all bidders, they were all on the same basis, and competition was unimpaired. This seems to be a perfectly reasonable rule.

NUISANCE—MORGUE AND UNDERTAKER'S ESTABLISHMENT.—The maintenance of an undertaking establishment in a building three or four feet from the residence of one of the plaintiffs and thirty-five feet from that of the other in a residence section of the city is a nuisance, where it is shown that noxious odors, gases, etc., from it are likely to permeate plaintiffs' houses, and that there is danger of contagion from the proximity of the morgue, and the possibility of flies passing from one place to the other. Densmore, *et al.*, v. Evergreen Camp No. 147, Woodmen of the World, *et al.*, 112 Pac. Rep. 255 (Wash., 1910).

While referring to the fact that the question of nuisance or no nuisance must be decided in each case upon its own facts, not by reference to the rules of the common law, and to the further fact that, in the present case, there would naturally be considerable mental discomfort to an ordinary person from the presence of such an establishment so near his home, the court bases its decision upon the fact that the proposed site was in the residence portion of the city, and that the danger of disease was "at least probable." In a case decided only a short time before, they went considerably further—indeed, probably extended the boundaries of nuisances—and held that the maintenance of a tuberculosis hospital in the residential section of a city, where its location caused depreciation in the value of contiguous property and such continued apprehension in the minds of the occupants of this property as to prevent their comfortable enjoyment of same, was a nuisance, although such hospital was carried on with due regard to the welfare of the community, as well as the inmates, and was a great benefit to the community, and the fear, while entertained by a large proportion of the neighborhood, was not founded on scientific facts. Everett, *et ux.*, v. Paschall, 111 Pac. Rep. 879. The decision really went on the interference with the comfortable enjoyment of plaintiffs' homes, not the lessening in value of their property. It will be seen that the court in deciding the present case preferred to rely on facts generally admitted to constitute a nuisance, than to take the opportunity of again expressing the view adopted in Everett v. Paschall, though it is very probable that, had there not been the additional facts in the principal case, they would have followed their previous decision.

Curiously enough, there is only one other case, apparently, where an undertaking establishment was sought to be restrained, and that was decided

against the complainant. Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490. The court in the present case attempt to distinguish this decision from their own, and possibly do so successfully; but a comparison of the facts in both cases and the reasoning of the Washington court indicate pretty clearly that they would decide the New Jersey case the other way, if it should come before them. There is little doubt, at any rate, that the principal case was correctly decided, taking the facts to be as stated. Wood, Nuisances, Third Ed., 1893, Vol. I, Sections 536, 541, 542, 545, and cases there cited. Cases involving hospitals and pest houses are sufficiently analogous in facts and principle to be of authority in such questions as the present one, and they support the view here taken. Deaconess Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215; Baltimore v. Fairfield Impr. Co., 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494; Cherry v. Williams, 147 N. C. 452, 61 S. E. 267, 125 Am. St. Rep. 566, which also decides that while the use of the building as a hospital will be restrained, its construction, without such use, will not. Joyce, Law of Nuisances, Section 397.

NEGLIGENCE—PLACING DANGEROUS INSTRUMENTS IN THE HANDS OF INFANTS.—Defendants sold an air-gun to a boy of thirteen, who, in using it on a city street, accidentally shot the plaintiff. *Held*, that it was a question for the jury whether the defendants were guilty of negligence, and the fact that such a sale is prohibited by law is some evidence of negligence. Folwell v. Grafton, 22 Ont. L. R. 550 (1910).

The law, in its care for human life, requires consummate caution in the person who deals with dangerous instruments; a person who places in the hands of a child an article of a dangerous character, and one likely to do injury to the child itself or others, is guilty of an actionable wrong; and, where injury results, the fact that some agency intervenes between the original wrong and the injury does not preclude a recovery if the injury was the natural or probable result of the original wrong. Binford v. Johnston, 82 Ind. 426 (1882). The leading case on this point is Dixon v. Bell, 5 M. & S. 198 (1816). A loaded gun was given to a child thirteen years of age, after the priming had been removed. She playfully pulled the trigger and a third person was thereby injured. Lord Ellenborough said: "The defendant might and ought to have gone further (than merely removing the priming); it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innocuous. * * * Consequently, as by this want of care the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible." This case represents the weight of authority and is applicable to vendors, as well as any other persons who place dangerous instruments in the hands of children. Carter v. Towne, 98 Mass. 567 (1868).

Some cases are to be found which are flatly contrary, but the reasoning is clearly faulty, and they are generally ridiculed by text writers. Thompson on Negligence, Vol. 1, Sec. 790, and cases cited therein. But exceptional cases may arise where it is not negligence to give a child of tender years a firearm; for instance, where the child is an expert shot, and accustomed to the use of firearms. Palm v. Ivorson, 117 Ill. App. 535 (1905).

TORTS—COMBINATIONS NOT TO DEAL WITH THE PLAINTIFF.—In Union Labor Hospital Association v. Vance Lumber Co., *et al.*, 112 Pac. Rep. 886 (Cal., 1910), the six defendant lumber dealers established a system of free medical service for injured employees. The hospitals rendering this service were paid with funds deducted from employees' wages, but the plaintiff hospital was not selected. The jury found the selection of hospitals was made without malice. The plaintiff brought a tort action, alleging an illegal combination to injure their business, but were unable to recover.

The decision seems correct as relief for the plaintiff is beyond even the modern law. If the rule of Walker v. Cronin, 107 Mass. 555, be applied and justification be required for the defendants' acts it is present in the case.

The defendants were innocent of actual malice and manifestly could not contract for services with every hospital. Beatty, C. J., reached the conclusion of the rest of the court on these grounds. He was careful, however, to point out that all such combinations were not necessarily legal: "A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy and furnish a ground of action." It is submitted that his is the correct view of the case.

The majority opinion reaches its conclusion on the theory that the right to deal or not to deal is absolute. It is submitted that the doctrine of relative business rights has been so universally accepted that the doctrine of absolute rights should be recognized as unsound. There appear, however, some Western cases where it is still adopted: Boyron v. Thorn, 98 Cal. 518; Banks v. Lumber Co., 46 Wash. 610; but see Parkinson v. Trades Council, 154 Cal. 581.